

JUL 24 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-02268

COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His Active Duty Service Commitment (ADSC) be changed to April 1999, rather than May 2001.

APPLICANT CONTENDS THAT:

He was not counseled that he would incur any service commitment for initial qualification in the KC-10; and that he has not signed any documentation accepting the ADSC.

Applicant's request is at Exhibit A.

STATEMENT OF FACTS:

Applicant was selected for PCS reassignment to [REDACTED] AFB and to fly the KC-10. He apparently completed the flying training and incurred a five-year ADSC of 1 May 2001.

AIR FORCE EVALUATION:

HQ AFPC/DPPRS sets forth the reasons for establishment of ADSCs for flying training, provides summary of the applicant's prior experience with ADSC-incurring events and recommends that the application be denied. It is indicated, in part, that counseling is normally accomplished during PCS relocation counseling necessary to prepare members' orders and to resolve any issues related to the upcoming PCS. However, relocation folders are destroyed a few months after the member's departure, so are unavailable for them to review to determine exactly what information was provided to applicant. Although MPFs are supposed to forward copies of AF Forms 63 to the officer's permanent files (at unit level and at AFPC), they sometimes neglect to do so; sometimes - as is alleged in this case - they fail to even accomplish an AF Form 63. (They suggest that could be due to the MPF clerk's confusion regarding PCS ADSC counseling, which requires no documentation, and the training ADSC counseling, which occurred simultaneously. Although

the latter should have been documented, it is possible the clerk mistakenly assumed otherwise.) However, although documentation of that counseling does not exist, applicant denies that it occurred, and a copy of the PCS notification RIP is no longer available to permit verification of applicant's signature accepting the assignment, they believe it's a reasonable presumption that competent counseling was provided and that applicant was in fact aware of the ADSC which would be incurred for training (Exhibit C with Attachments 1 through 6).

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant submits an in-depth response to the advisory opinion and continues to maintain that he was not counseled concerning the ADSC in question (Exhibit E.)

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting favorable action on the applicant's request that his ADSC be changed to April 1999, rather than May 2001. In this regard, we note that:

a. The applicant contends that he was not counseled that he would incur any service commitment for initial qualification in the KC-10; and that he has not signed any documentation accepting the ADSC.

b. The Air Force states that although documentation of that counseling does not exist, applicant denies that it occurred, and a copy of the PCS notification RIP is no longer available to permit verification of applicant's signature accepting the assignment, they believe it's a reasonable presumption that competent counseling was provided and that applicant was in fact aware of the ADSC which would be incurred for training.

c. In the most recent court decision involving an ADSC (U.S. District Court, Eastern District of California), the Court noted that although the governing regulation, AFR 36-51, requires that ADSC counseling be provided, the regulation also stated that the fact advance ADSC counseling did not take place or if the officer was miscounseled does not negate an ADSC. The Court then determined that given this proviso, the Air Force's apparent failure to provide the petitioner with ADSC counseling does not

permit the invalidation of the extended commitment he incurred by accepting C-141 training. In sustaining the constitutionality of the regulation, the Court commented that the regulation "is unremarkable in placing an ultimate duty of inquiry on the officer who accepts training while at the same time enjoining the Air Force to provide counseling."

d. In interpreting this court decision, AFPC/JA has stated that the decision must be followed only in the district where it was rendered. Moreover, this court decision is not binding on us in any manner. Nevertheless, in their view, the case may be cited as persuasive authority (that is, the reasoning is sound and emanates from a distinguished federal court) for two basic propositions:

(1) Pursuant to AFR 36-51/AFI 36-2107, the absence of an Air Force Form 63 and even the absence of evidence of ADSC counseling do not compel the invalidation of an ADSC.

(2) Evidence that an officer benefited from training and acted unreasonably in failing to investigate the length of his ADSC are valid reasons for denial of an ADSC appeal.

In deference to the opinion of the Staff Judge Advocate, AFPC, the applicant does not appear to have a legal right to the relief being sought notwithstanding the absence of proper counseling by responsible Air Force Officials. However, since we are empowered to recommend relief based on our perception of an injustice, the lack of a legal entitlement is not dispositive of the merits of the applicant's case.

4. Applicant's contentions are duly noted. However, we do not find these contentions, in and by themselves, sufficiently persuasive to conclude that the applicant was unaware of the service commitment he would incur as a result of his completion of initial qualification in the KC-10. Therefore, we agree with the recommendation of the Air Force and adopt its rationale as the basis for our conclusion that the applicant has failed to sustain his burden of establishing the existence of either an error or an injustice warranting favorable action on his request.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 26 June 1998, under the provisions of AFI 36-2603:

Mr. LeRoy T. Baseman, Panel Chair
Mr. Benedict A. Kausal IV, Member
Mr. David W. Mulgrew, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 24 Jul 97.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFPC/DPPRS, dated 31 Mar 98, w/atchs.
Exhibit D. Letter, SAF/MIBR, dated 20 Apr 98.
Exhibit E. Letter, Applicant, dated 23 Apr 98.

A handwritten signature in black ink, appearing to read "L. T. Baseman". The signature is fluid and cursive, with a large initial "L" and "T".

LEROY T. BASEMAN
Panel Chair